



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

JUDICIAL REVIEW CASE NO. 527 OF 2016

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS & PROHIBITION**

AND

**IN THE MATTER OF THE SECTION 24(B) AND SECTION 51(1)(B) AND (D) OF THE
NATIONAL POLICE SERVICE ACT**

IN THE MATTER OF THE TRANSPORT & AUTHORITY ACT (ACT NO. 33 OF 2012)

AND

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

BETWEEN

RISEN COMPANY LIMITED.....APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE NAIROBI CITY COUNTY GOVERNMENT.....3RD RESPONDENT

THE TRAFFIC COMMANDANT.....4TH RESPONDENT

THE CENTRAL POLICE STATION OCS.....5TH RESPONDENT

THE BURU-BURU POLICE STATION OCS.....6TH RESPONDENT

THE KAYOLE POLICE STATION OCS.....7TH RESPONDENT

THE KAMUKUNJI POLICE STATION OCS.....8TH RESPONDENT

AND

MWAMBA SACCO.....	1 ST INTERESTED PARTY
UMMOINNER SACCO.....	2 ND INTERESTED PARTY
UTIMO SACCO.....	3 RD INTERESTED PARTY
CITY TRAM LIMITED.....	4 TH INTERESTED PARTY
MARVELOUS SHUTTLE LIMITED.....	5 TH INTERESTED PARTY
<i>EX-PARTE</i>	RISEN COMPANY LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd November, 2016, the *ex parte* applicants herein, **Risen Company Limited**, seeks the following orders:

a. **THAT, by way of Judicial Review, an order of prohibition do issue prohibiting the Respondents from allowing the interested parties hired agents, servants, employees, or anyone acting under them, or at the Interested Parties behest from blocking, hindering access to, closing the doors or otherwise howsoever interfering with the Ex – Parte members PSV vehicles operating as such along Umoja – Komarock- Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.**

b. **THAT, by way of Judicial Review an order of mandamus issue, compelling the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents to provide security to the Ex Parte Applicant’s members PSV vehicles operating as such PSV along the Umoja – Komarock – Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.**

c. **THAT, by way of Judicial Review, an order of mandamus issue, compelling the 5th and 6th Respondents to forthwith apprehend and conclude investigations into the breach of security perpetuated by such of the Interested Parties’ agents/ servants responsible for the acts of malicious damage to the Ex Parte Applicant’s members PSV vehicles as recorded under OB NO. 96/26/10/16 and OB NO. 42/30/10/2016 respectively.**

Ex Parte Applicant’s Case

2. According to the Applicants, they are duly registered limited liability company under the **Companies Act**, 2015 on 6th July, 2016, under Certificate of Registration No. PVT/2016/017225 and is duly licenced by the National Transport & Safety Authority (hereinafter simply referred to as the “NTSA”) as PSV operator.

3. According to the applicants, their Road Service Licences (RSL) permit them to operate via Jogoo Road, from Ronald Ngala, to Umoja, Komarock and back to the City Center. The members of the applicants, it was averred associated themselves to form the Ex parte Applicants as a consequence of the relevant statutory body authorizing the formation of Saccos, Companies and such Associations for PSV operators to ease registration. However, the Ex parte Applicants are governed in accordance with the existing laws and their Articles of Association by which all their members who have voluntarily sought to join in abide.

4. The applicants averred that since the NTSA duly authorized them by a letter dated 15th September, 2016, their continued operation of the said PSV buses and PSV vans by the Ex parte Applicant's members is lawful. Indeed all the Ex parte Applicant's members' vehicles are licensed to operate along the Umoja-Korarock-City Center Route, by the NTSA.

5. It was averred that the 3rd Respondent herein, the Nairobi City County Government, has a Transport docket and department and by a letter dated 17th October, 2016 it recognized the operations of the Ex parte Applicant's PSVs and indeed authorized the operations. Accordingly, the applicants contended that their PSV vehicles are entitled to operate uninhibited along the Umoja-Komarock-City Center Route via Ronald Ngala Road and Jogoo Road. They contended that there have been no infractions of the law to date from the date when the NTSA licensed their vehicles. They therefore contended that the Interested Parties ought to respect free enterprise and the Rule of Law and this honourable court ought to issue the prohibition orders sought that the Interested Parties cannot venture outside the scope of the law and invade the applicants' vehicles as they stop to pick up passengers next to their vehicles along Ronald Ngala and Jogoo Roads to Umoja and Komarock destinations and back.

6. According to the applicants, all of the NTSA licenses referred to in the foregoing paragraphs clearly exemplify that their members are entitled to operate from Ronald Ngala vis Jogoo Road to Umoja and Komarock, yet as of now they are being blocked by the Interested parties' hired goons, vagabonds and layabouts, necessitating this Judicial Review Court's intervention as sought herein yet the Ex parte Applicants, jus like the interested parties, are permitted and authorized to pick up passengers for their PSV buses at Ronal Ngala Road.

7. The applicants asserted that none of the Interested Parties have any basis to allege that their members cannot operate at all as such PSV operators via Jogoo Road, from Ronald Ngala, to Umoja, Komarock and back to the City Center since none of their members' RSL licenses have to date been suspended, revoked, or otherwise varied. The ex parte applicants therefore believed that the prohibition order sought is in itself in furtherance of the plain and manifest statement of the RSL particulars.

8. The applicants deposed that the 4th Respondent (Traffic Commandant) is the overall in charge of Traffic issues in Kenya and particularly in the Nairobi City County and to date he is bound was to ensure that no harassment of the PSV minibuses of the applicants' members are in any way harassed or stopped from operating by the Interested Parties as long as the NTSA issued RSL PSV licenses continues to operate. Yet as of October 31st 2016, the applicants' buses and vans whose RSL PSV licenses remain valid could not operate due to the harassment meted on their drivers, vehicles and crew by the hooligans, goons, and vagabonds hire by the Interested Parties.

9. The applicants contended that it was their legitimate expectation that the 2nd Respondent and officers under him would abide by the law and in particular the provisions of sections 24(b) and 51(1)(b) and (d) of the **National Police Service Act**, Act Cap 84 of the Law of Kenya regarding the maintenance of law and order. It was further averred that the 3rd Respondent, the Inspector General, is mandated under section 24(j) of the said Act to ensure that police officers under him and the 4th Respondent (Traffic Commandant) perform such duties as are in furtherance of the Rule of Law.

10. According to the applicants, they were compelled to invoke the court's jurisdiction to ensure that these prescriptions of the law are adhered to as there is a threatened breakage of law and order by the acts of the Interested Parties herein complained of, absent this court's intervention. To them, they cannot without the company of police officers operate their duly licensed PSV vehicles along Jogoo Road – Umoja- Komarock Route in spite of the express provisions of what their advocate on record explained to them are the provisions of section 51 (1) (h), (i), and (k) of the **National Police Service Act** since the Interested Parties hired hooligans and vagabonds to attack their members' buses lawfully using the lawfully authorized terminus and route at Ronald Ngala Road and Logo Road as well as Umoja, Komarock, Joska and Market, where the Interested Parties goons and vagabonds have invaded.

11. According to the applicants, these violations of the law are impermissible and the message the 2nd to

8th Respondents are sending by means of sanctioning and approving such actions is that there is no respect for the Rule of law in Kenya and the Interested Parties are in fact a law unto themselves. This is despite the fact that the provisions of section 49(13) of the **National Police Services Act** affords them the lawful bases of asserting the protection of the law afforded to them under the provisions of Article 27(1) of the Constitution hence this Court ought to issue orders to stop the said illegal acts.

12. It was the applicants' case that only police officers in uniform are authorized under the **National Transport & Safety Authority Act** to remove the Ex parte Applicant's member's vehicles from the road whose RSL PSV licences have been revoked by the NTSA which has not happened. The applicants' was therefore that an order of *mandamus* is therefore necessary as herein sought.

13. The applicants had a legitimate expectation that the 5th and the 6th Respondents would abide by the Rule of Law and statutory provisions regarding the action to arrest and bring to book the Interested Parties hired agents/servants, goons and such like who committed acts of malicious damage to the Ex parte Applicant's specified vehicles as reported under OB No. 96/26/10/16 and OB No. 42/30/10/2016 respectively. It was therefore their case that it is imperative that the orders sought in exercise of the Court's Inherent Power and to the end that justice will be met as sought are granted to them, otherwise they stand to suffer grave prejudice and loss.

14. Based on legal advice the applicants averred that section 57(2) of the **National Police Service Act** gives the 2nd and 3rd Respondents summary powers to bring the illegalities of the Interested Parties to a halt yet they continue to neglect this statutory duty in spite of the applicants' official complaints. The applicants maintained that the overlooking of this provision grossly deprives them of the protection of the law envisaged under the provisions of Article 27(1) of the Constitution.

15. As a result of the foregoing the applicants contended that they had thus been compelled to ground their vehicles due to the malicious damage to their vehicles by the throwing of stones by the Interested Parties' hired goons, vagabonds and layabouts, leading to a huge loss.

16. The applicants believed that competition in business is healthy and in any event legally sanctioned. According to them, by the provisions of section 30(1)(c) of the **National Transport & Safety Authority Act**, Parliament envisaged the lawful issuance of RSL licenses to qualified Applicants and who stand on equal standing before the law as conferred by Article 27(1) of the Constitution of Kenya. However the applicants' members stand to be prejudiced in the exercise of their rights of commerce.

17. The 4th and 5th Respondents were accused that in acting in the manner they have as set out violate the respect for the rule of law in Kenya and the respect for the Constitution of Kenya by ignoring lawfully lodged complaints by the applicants. Apart from that the applicants averred that by their letters dated 27th October, 2016 to the Interested Parties respectively they also sought the intervention of the said parties to ensure their agents/servants do not breach security and have the goons and vagabonds hired by them cease their harassment all in vain.

18. The applicants lamented that contrary to the provisions of section 26(1) of the **NTSA Act** their members have deprived of their right to be treated equally before the law since their members are only operating their PSV vehicles in conformity with the lawful demands of the relevant statutes in a democratic manner, and they ought therefore to do so securely.

19. The applicants asserted that such conduct of the Interested parties without the security provision expected of the 2nd to 8th Respondents to the applicants is thus oppressive to the applicants' members and amounts to a gross abuse of the powers of the said Respondents in omitting to intervene as sought.

20. The applicants therefore sought the orders sought herein.

1st, 2nd, 4th 5th & 6th and 7th Respondents' Case

21. The application was opposed by the 1st, 3rd, 4th 5th & 6th Respondents.

22. According to the said Respondents, Ronald Ngala/Mfangano junction is not a designated bus layby or a passenger pick up facility. According to them, in discharging their duties together with their officers they ensure there is law & orderliness by only arresting and charging the traffic offenders who violate traffic rules as laid down and this is done without any bias or ill will whatsoever.

23. They therefore denied that they have neglected to maintain law and order or failed to arrest nor presided over lawless acts between the ex-parte applicants and the interested parties in their operations, it's drivers as well as their vehicles while operating along the designated bus stops, bus lay-bys and termini on the Ronald Ngala, Jogoo Road, Komarock routes as alleged.

24. The said Respondents contended that the letter dated 17th October 2016 exhibited by the applicants does not in any way suggest authorization or approval of the ex-parte applicants to operate along Ronald Ngala/Mfangano street but is a mere communication emphasizing the importance of observing the county Matatu Termini by-laws. Furthermore The Nairobi County Government stopped licensing new operators as well as issuing letters allocating stages and bus termini in 2014 in a bid to curb congestion.

25. The said Respondents asserted that in discharging their duties they guided by the **National Police Service Act & Traffic Act**. In discharging these duties and especially when dealing with public transport within Nairobi, it is impractical to provide security exclusively to the ex-parte applicant to the exclusion of all other members of the public and *matatu* operators.

26. It was averred that traffic in Nairobi is a cause of concern and a challenge to all residents of Nairobi as well as the concerned authorities within Nairobi county and as such it takes collective responsibility and good will from the residents, public transport stake holders as well as all private motorists together with the relevant authorities to find a lasting solution. It was however averred that the traffic department is committed towards partnering with all stakeholders in ensuring proper management of traffic flow within and outside the city of Nairobi and in doing so, it discharges its duties impartially while taking into account the congestion in the city and the status of available transport infrastructure which are all shared resources and therefore there is need for sobriety in addressing and approaching matters pertaining to the situation.

27. It was submitted on behalf of the said Respondents that the orders of prohibition sought against the offices of the respondent should not be issued as the same will amount to barring the respondents or any of its officers from exercising its mandate over the applicants in the course of discharging their public duties where the applicants herein are involved.

3rd Respondent's Case

28. The 3rd Respondent, the Nairobi City County Government similarly opposed the application.

29. According to the County, it is apparent that the gist of the Ex Parte Applicant's Application as against the 3rd Respondent is that pursuant to section 30(6) of the **National Transport & Safety Authority Act**, the 3rd Respondent in consultation with the NTSA approved its member route. More specifically, that the 3rd Respondent issued authority to the Ex Parte Applicant's members to pick passengers from Ronald Ngala Road pursuant to the Applicant's subsisting RSL Licenses authorizing them to pick passengers at the stated point. According to the Applicant therefore, the 3rd Respondent owes it a duty to provide security to its members to ensure a peaceful realization of the attendant authorization to ply the route in question.

30. The County Government however averred that although it is involved in the process of the issuance of licenses and authorization of plying certain routes, it does not have any constitutional or statutory

mandate to provide security be it on the roads or anywhere else for that matter which role is exclusively that of the National Government of Kenya through the National Police Service.

31. It was averred that Article 243 of the Constitution establishes the National Police Service which consists of the Kenya Police Service and the Administration Police Service and that section 8(1) of the **National Police Service Act** Cap 84 gives the Inspector General the exclusive mandate of exercising control over the National Police Service to the Office of the Inspector General which means that any function that is reserved for the National Police Service can only be performed under the directive of their commanding boss who is the Inspector General according to the Constitution of Kenya and not any other person however genuine the intention of that person is. Further, section 8(2) of the **National Police Service Act** Cap 84 empowers the Inspector- General to delegate his duties to an officer subordinate to him. It was averred that under the **National Police Service Act** a police officer means an Administrative Police Officer or a Kenya Police Officer and includes officers of the Directorate of Criminal Investigations and Reservists. That from the foregoing it is apparent that county officers are not members of the National Police Service and cannot therefore purport to exercise police powers.

32. To the County Government in so far as security is concerned is envisaged under sections 41 and 97 the **National Police Service Act** and is majorly nothing but a supportive and not an active/direct role which roles do not involve the enforcement of law and order in any way whatsoever and is a mere background kind of role.

33. It was averred that whereas section 41 of the **National Police Service Act** Cap 84 makes provision for the establishment of the County Policing Authority with functions of the County Policing Authority under section 41(9), section 54 of the **National Police Service Act** expressly provides that the Kenya Police is to maintain order on roads and that there is no demarcation as between county and national roads in so far as maintenance of order on roads is concerned.

34. It was however disclosed that the County has a traffic department whose officers are called County Traffic Enforcement Officers whose role does not extend to offering security. According to the County Government, the national and county governments are in fact still in the process of harmonizing the roles of the county traffic officers. It was however reiterated that the County Traffic Enforcement Officers are not charged with the role of providing security in relation to county traffic management since the role of maintenance of law and order in the road is restricted to the National Police Service and the County Traffic Enforcement Officers would be acting ultra vires if they purported to start exercising this role. Therefore all the traffic offices within the county government do not have any constitutional or statutory role to play in so far as maintenance of law and order on the roads is concerned.

35. According to the County Government, the alleged allegations as against the interested parties are of a criminal nature that exhibit a clear breach of security on the roads. The County Government of Nairobi is an ardent respecter of the rule of law and if at all the alleged harassment and destruction of the Applicant's vehicle by the interested parties members is true, then it is neither a supporter or condoner of the same; be that as it may, it cannot however purport to provide security when there are constitutionally mandated bodies responsible with providing the same.

36. The County Government's case was that prerogative orders of mandamus can only be issued against a body that is statutorily mandated to act in a particular way and relied on **Abdikadir Salat Gedi vs. Principal Registrar of Persons & Another [2014] eKLR**. To the County Government, if the court grants the prayers herein as against the 3rd Respondent then it will be going against the well laid down principle that an order of mandamus can only be granted to compel a body/person to perform a mandate that it is legally bound to perform.

37. It was therefore its case that this Application ought to be struck out as against the 3rd Respondent as it is clear that the roles of provision of security and maintenance of law and order on the roads fall exclusively with the National Police Service.

1st, 2nd, 3rd and 4th Interested Parties' Case.

38. The 1st to 4th interested parties similarly opposed the application.

39. According to them, **Umoiner Sacco, Mwamba Sacco, Utimo Sacco** and **City Tram Limited** are duly registered by the NTSA to operate Public Service Vehicles (**PSVS**) along the **Umoja-Komarock-Ronald Ngala-Nairobi CBD Route** and to this end they have been issued with **RSL PSV Licenses**.

40. According to them, **Mr. Isaac Richui Karanja** is the sole director of **Risen Company Limited** having registered it on 6th July 2016. It was averred that the said director is a former director and manager of **Marvelous Shuttle Limited**, the 5th Interested Party herein. The ex parte applicant, it was therefore averred is a splinter group of the 5th Interested Party and upon registering the said Company, the Applicant's Director embarked on a well orchestrated scheme to fraudulently and unprocedurally acquire RSL PSV licenses for the Umoja-Komarock-Ronald Ngala-Nairobi CBD route as a result of which the Applicants were granted Licenses to operate the said routes though the same was predicated on misrepresentation of facts and forgery of documents.

41. The interested parties averred that upon realising the grant of RSL to the Applicants, the 5th Interested party wrote protest letters to NTSA seeking revocation of the Applicant's License and in order to resolve the impasse and the imminent confrontation, the *Matatu Owners Association* held a stakeholders meeting on 31st October 2016 and in attendance were the Interested parties and the Applicant.

42. According to the interested parties, there are glaring anomalies in the manner the Applicant acquired his license, to wit;

a. The Applicant does not own any of the public service vehicles which it purports belongs to the company.

b. The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 provide in mandatory terms under Rule 5 that for one to be licensed to operate as a body corporate they must own a minimum of Thirty (30) vehicles which is not the case with the Applicant.

c. The said Rules further indicate that a party can only operate in the route where they are licensed. About 15 or more vehicles listed in the Applicants pleadings all operate under a SACCO called **Marimba SACCO** whose RSL route is Zimmerman and Thika Road.

d. That going by the foregoing Paragraph, the Applicant is in breach of Rule 6 (g) and (k) of the said Rules.

e. Since the Applicant Company is a splinter group of the 5th Interested Party, the rules obligate it to continue the route that the main operate held a license.

43. The interested parties averred that as at 29th October 2016, the Applicant had been ordered by the NTSA to surrender the RSL for motor vehicles KCF 626U and KCH 078N as the same had been procured using the 5th Interested party's documents whereof this fact was not disclosed to the Court at the filing of the Application otherwise this vehicles have been blacklisted.

44. It was the interested parties' case that the orders sought herein amount to interfering with the independent functions and powers of the 2nd to 8th Respondents without taking into account their *modus operandi* in matters security. To hem, the Applicants' suit is wont on legalising and /or sanitising illegally acquired licenses and also in allowing the Applicant to breach NTSA rules whereby they operate vehicles which have been blacklisted and also vehicles belonging to another SACCO whereof the same will be a detriment of the validly licensed operators of the routes in issue.

45. It was revealed that the interested parties have lodged Appeal No. 19 of 2016 at the Transport

Licensing Board challenging the legality of the licenses issued to the Applicant. To them, the reason of coming up with the rules to control the industry was to bring sanity and some level of organisation which the Applicant now seeks to destabilise. It was therefore their view that the Applicants seek equitable reliefs yet their hands are soiled with illegalities and material non-disclosure.

46. The interested parties asserted that since there is no evidence linking the interested parties to the alleged destruction or breach of peace this remains an ill-motivated accusation and urged the Court to dismiss the application.

47. The said interested parties submitted that being aggrieved by the issuance of the Road Service License to the *ex-parte* Applicant, they exercised their rights of Appeal under section 38 of the *NTSA Act* and filed Appeal No. 19 of 2016.

48. According to the interested parties, their grievances can only be ventilated through the Appeals mechanism created under the Act. It was their submission that it has not been demonstrated by the Applicants that the 3rd Respondent has acted without jurisdiction or has not granted the Applicant the right to be heard. If anything, the Applicant was duly served with a hearing notice for the said appeal. In their view, the only reason this application was filed is to further illegalities and to avoid accountability.

49. It was submitted that by preventing the 3rd Respondent to proceed with the Appeal in light of a *bona fide* objection by Interested Parties, the Court will be curtailing exercise of statutory powers. In support of their case the interested parties relied on **Thuku Kirori & 4 Others –vs- County Government of Murang’a [2014] eKLR** where the court held that:

“Moreover, where a statute or constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to a particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates”

50. It was emphasised judicial review is a remedy of last resort and a party ought to endeavour to exhaust the alternative remedies available and reliance was placed on **Republic –vs- Chief Magistrate Nanyuki Law Courts Ex Parte Purity Gathoni Macheru [2016] eKLR** where the court held that;

“The Learned authors Beatson, Mathews and Elliot in the book Administrative Law on availability of alternative remedy had this to say.’ It is generally accepted that, at least in principle , judicial review is a remedy of last resort, to be invoked only when other avenues , such as rights of appeal...have been explored; if not then permission may be defined.”

51. It was submitted that the only inference to be drawn from the Application is that the Applicant is wont on using the Court for ulterior motives and the Court ought not to countenance the same. The interested parties relied on **Republic -vs- Principal Secretary Ministry Of Industrialization & Enterprises & Another Ex-Parte Rishit Metals Limited** (supra) where it was held that:

“...the court will not exercise its discretion in favour of an applicant where it is clear that the judicial review orders are being sought for an ulterior purpose. Orders of judicial review are meant to assist in the enforcement of the rule of law”

52. Based on the foregoing, the Court was urged to dismiss the Notice of Motion Application dated 22nd November 2016 with costs.

Determination

53. I have considered the issues raised in this application.

54. The scope of and the grounds for the grant of judicial review orders were discussed in depth by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others**

Civil Appeal No. 266 of 1996 as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.

55. In this case the applicants’ case is that although they have Road Service Licences (RSL) permitting them to operate via Jogoo Road, from Ronald Ngala, to Umoja, Komarock and back to the City Center the interested parties have hindered their right to do so through hooligans, goons, and vagabonds hired by the Interested Parties to carry such unlawful action.

56. It was not contended that the applicants are not authorised to operate along the said route. In fact the interested parties conceded that the applicants were in fact authorised to do so while the 3rd Respondent, which is the licensing authority, maintained a deafening silence on the issue. The interested parties however contended that the ex parte applicants fraudulently and unprocedurally acquired RSL PSV licenses for the Umoja-Komarock-Ronald Ngala-Nairobi CBD route as a result of which the Applicants were granted Licenses to operate the said routes though the same was predicated on misrepresentation of facts and forgery of documents. To this end they had lodged a complaint as they were entitled to before the National Transport and Safety Authority.

57. It is the duty of the 3rd respondent to regulate the flow of traffic into the CBD and in so doing it can enlist the services of the 4th Respondents as well as that of the NTSA. In fact under the *National Safety & Transport Authority Act*, section 4(1)(c), one of the functions of the NTSA is to plan, manage and

regulate the road transport system in accordance with the provisions of the Act. The 2nd, 4th to 8th Respondents as law enforcement officers are clearly under obligation pursuant to sections 24(b) and 51(1) (b) and (d) of the **National Police Service Act**, Act Cap 84 of the Law of Kenya to maintain law and order.

58. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**, it was held that:

“Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. Fortiori it should be an appropriate remedy to compel the performance of a constitutional duty.”

59. I have viewed the videos which were exhibited by the applicants. Whereas it is clear that the operations of the applicants are anything but peaceful there is no evidence that the culprits are the interested parties.

60. It is however the duty of the respondents to maintain law and order and to ensure for the applicants a quiet and peaceful business atmosphere as long as their licences remain valid. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) the purpose of an order of *mandamus* is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The applicants and the interested parties have the right to operate their business in a fair atmosphere as competitors without either of them being afforded unfair advantage over the other unless such differentiation is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and further it must have a rational relation to the object sought to be achieved by the law in question. As this Court held in **Republic vs. Nairobi City County Government & 2 Others Ex-Parte Nucleur Investments Ltd & Another [2015] eKLR**.

“In my view, whereas the ex parte applicants are entitled to be protected in carrying out their businesses, this protection ought not to be interpreted to mean that the ex parte applicants have exclusive right to use the areas allocated to them by the Respondent. To do so would result to the stifling of competition in the business world, a situation which would be conducive to promotion of monopolistic policies rather than free market economy to the detriment of the consumers of transport services. Article 46(1)(c) of the Constitution protects the rights of the interests of the consumers.”

61. If the object was to decongest the CBD as contended by the 1st, 3rd, 4th 5th & 6th and 7th Respondents' Case, then there ought to have been an explanation as to why only the interested parties are permitted to operate along the routes in question when the licences issued to the applicants have not been revoked. As long as the applicants' licences remain unrevoked the applicants have as much right as the interested parties to operate along the subject routes undisturbed and the Respondents are under a Constitutional and statutory duty to ensure that they carry out their business without being harassed as long as they comply with the law. Their failure to do so would amount to abdication of their roles of ensuring that there is order in the operation of traffic within the County by closing their eyes to what is clearly a transgression of the law.

Order

62. In the premises an order of *mandamus* is hereby issued directed to the 2nd to 8th Respondents compelling them to take the necessary legal steps to ensure that the applicants carry out their PSV operations along peacefully without interference by third parties and in accordance with the terms of their licence as long as the same remains valid.

63. As there is no compelling evidence that satisfies me that the culprits are the interested parties, there will be no order as to costs.

64. Orders accordingly.

Dated at Nairobi this 20th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ndolo for the 5th interested party and holding brief for Mr Maingi for the 1st to 4th interested parties

Miss Daido for Mr Okumu for the Respondent

CA Ooko